BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWARD D. HARDIN Claimant VS. **ALCON, INC.** Respondent AND **CIGNA** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 168,740

ORDER

ON the 8th day of March, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated January 19, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Dale V. Slape of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Douglas C. Hobbs of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Andrew E. Busch of Wichita, Kansas. There were no other appearances.

RECORD

The record considered on appeal is the same as that listed in the Award by the Special Administrative Law Judge.

STIPULATIONS

The Appeals Board adopts the stipulations listed in the Award of the Special Administrative Law Judge.

ISSUES

The issues considered by the Special Administrative Law Judge included whether the claimant met with personal injury by accident arising out of and in the course of his employment with the respondent on August 23, 1991. The Special Administrative Law Judge found in the affirmative on this issue and no appeal was taken from that finding. The sole issue presented for determination by the Appeals Board is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of the arguments by the parties and review of the entire record, the Appeals Board finds, for the reasons stated below, that claimant sustained a forty percent (40%) permanent partial general work disability.

Claimant, at the time of his regular hearing testimony, was a thirty-eight year old construction worker with an eleventh grade education and no vocational training. He has a GED. He has worked in heavy manual labor most of his adult life but also has worked in auto mechanics.

During the spring and summer of 1991, he testified he was not having any problems with his low back or legs other than occasional muscle ache from strain. On August 23, 1991, claimant was stripping out a trailer pulling shelves when he felt a “pop” in his low back. The pain in his low back was such that he waited for a co-worker before completing this work. He finished out the day painting. During this time, the pain increased to the point where he could hardly stand up. This occurred on a Friday. The following Monday he notified his employer of his injury and was directed to seek medical treatment. He has been unable to obtain steady employment since this accident, engaging only in occasional odd jobs.

Claimant has a long history of low back problems, including surgeries in 1977, 1980, and 1985. The 1977 spine surgery consisted of a discectomy and fusion at L5-S1. It resulted in claimant being off work for one (1) year followed by a return to regular work in construction. In 1980, another injury resulted in a second surgery followed by six months off work and a return to his previous employment in construction and later in a lumber yard. In 1984, claimant re-injured his back while working in the lumber yard and had surgery in February 1985. He was off work one (1) month and then returned to work in construction putting in concrete basements. This was heavy labor which regularly involved lifting weights of one-hundred (100) pounds and forceful pushing and pulling. There were subsequent low back injuries which resulted in lost time from work including an injury in 1989 and, according to the medical records, another on June 6, 1991. He returned to work following that injury on July 7, 1991, and was re-injured on August 23, 1991, which is the subject of this claim.

After the subject accident, claimant first returned to Dr. Duane Murphy who had treated claimant periodically since prior to his initial discectomy and fusion surgery in 1977. Dr. Murphy obtained x-rays and referred claimant to Dr. Snyder for consultation. A CT scan was obtained. Dr. Snyder determined claimant was not a candidate for surgery and returned him to Dr. Murphy who in turn referred him to Dr. Blaty, a physiatrist. He was put on an exercise program for two (2) months during which time claimant stated his condition

worsened. He was released to return to work with restrictions on January 22, 1992. Claimant worked for about three (3) weeks and was laid off. His condition failed to improve. He had a work capacity evaluation performed and was again released to return to work March 27, 1992, but by this time he had no job to return to. He has not worked since February 14, 1992, except for some odd jobs. Claimant testified that he can only work about three to four hours at a time and he cannot sit or stand in one position for too long. He has intermittent low back pain which is increased with prolonged sitting and standing. He cannot do any significant lifting. He also has radicular pain in the posterior thigh and calf and describes numbness and tingling in the lateral aspect of the thigh and leg bilaterally.

The deposition of Robert A. Rawcliffe, Jr., M.D. was taken on behalf of claimant. Dr. Rawcliffe is a board-certified orthopedic surgeon in Wichita, Kansas. He no longer performs surgery but restricts his practice to non-operative orthopedics. He examined claimant on September 29, 1992. He had also seen claimant previously on June 3, 1980. It was his impression at that time that claimant had some radicular neuritis secondary to adhesions around the nerve root at the operative level. However, he could not exclude the possibility of another herniated disc at the next higher level of the spine. It was Dr. Rawcliffe's impression from a review of earlier x-rays that claimant had a solid fusion at L5-S1 in 1980 but that x-rays taken in 1982 indicated that while there was no motion at L5-S1 there did not appear to be a solid fusion. He noted that claimant had had three previous back surgeries, the first in 1977 by Dr. Kneidel and two operations in 1980 and 1984 by Dr. Krupka, with improvement following each operative procedure. There was evidence of aggravation in 1989 and 1990.

Dr. Rawcliffe diagnosed failed back syndrome, a diagnosis which includes patients who have had multiple surgical procedures but with recurrent episodes of back and lower extremity pain. He rated functional impairment at twenty percent (20%) to the body as a whole. He stated it would be difficult to estimate how much of this impairment could be attributed to the August 23, 1991, injury but did estimate claimant had a fifteen percent (15%) impairment prior to the most recent injury and that his impairment was increased by five percent (5%). He recommended claimant be restricted to sedentary work with occasional lifting of up to ten (10) pounds and that frequent lifting should be limited to light weight articles. Dr. Rawcliffe acknowledged that the claimant's functional capacity evaluation indicated claimant was capable of returning to the medium-work category with occasional lifting of up to fifty (50) pounds and frequent lifting of up to twenty-five (25) pounds. However, in his opinion, this would result in a reoccurrence of severe pain followed by a period of incapacitation. Dr. Rawcliffe did agree that it would not be unrealistic to allow claimant to function in the light-work category with occasional lifting up to twenty (20) pounds and frequent lifting of up to ten (10) pounds. He noted that Dr. Blaty had found claimant capable of functioning in the medium physical demand level defined as exerting up to fifty (50) pounds occasionally and twenty (20) pounds frequently and up to ten (10) pounds to move objects. Dr. Blaty's restrictions included sitting for periods of up to one (1) hour at a time with an opportunity to change positions, occasional bending at less than ten (10) times per hour, maximum lift of fifty (50) pounds, occasional lift of thirty-five (35) pounds (sic) and a permanent impairment rating of twenty percent (20%). These restrictions were consistent with the functional capacity examination performed on March 23, 1992. In Dr. Rawcliffe's opinion, the fusion at L5-S1 either did not take or has broken loose because claimant now has a pseudoarthrosis or broken fusion. He now thinks the fusion was probably never solid as opposed to it having broken loose as a result of the most recent accident. In his opinion, the x-rays taken on January 26, 1992, indicate the fusion was not solid at that time as noted in the records by Dr. Kneidel. Dr. Rawcliffe stated that he probably would have placed the same restrictions on claimant prior to the

August 23, 1991 accident and that his restrictions would not have been increased following that accident. The only thing that has changed is that claimant is now more symptomatic and therefore he gave him an additional five percent (5%) impairment rating.

Respondent obtained the deposition of Eustaquio Abay, II, M.D., a board-certified neurosurgeon, who first examined claimant on February 6, 1990, prior to the subject injury. At that time he diagnosed chronic L5-S1 radiculopathy most probably related to stretching of the nerve roots over scar tissue from previous surgery. He recommended at that time to claimant that he consider a less physically demanding job. In his opinion, claimant needed to avoid lifting above seventy (70) to one-hundred (100) pounds.

The deposition of Thomas W. Kneidel, M.D., was taken on behalf of the Kansas Workers Compensation Fund. Dr. Kneidel is a board-certified orthopedic surgeon in Wichita, Kansas. He initially saw the claimant in consultation on October 12, 1977, and within a few days thereafter performed a lumbar discectomy and fusion on him. In his opinion claimant had a twenty percent (20%) impairment of function as a result of that 1977 injury. This rating was given by him on April 12, 1978. Dr. Kneidel continued to treat claimant for back complaints until 1982 but he did not perform the subsequent surgeries. According to his records, he imposed lifting restrictions of fifty (50) pounds in the return to work release form dated April 12, 1978. That was the only restriction that appears in his records. The return to work slips reads “If possible, limit lifting to 50 lbs.” It also states that claimant is being released to regular work. Dr. Kneidel testified that the reason for the fifty (50) pound lifting restriction was to avoid a reoccurrence of claimant's back problem and to avoid re-injury.

The deposition of Jerry D. Hardin was taken on behalf of the claimant for the purpose of offering evidence on the issue of work disability. Using Dr. Blaty's restrictions and the state of Kansas as the open labor market, Mr. Hardin found a forty-one percent (41%) loss of claimant's ability to perform work and access that labor market. Using Wichita, Kansas, as the open labor market and Dr. Blaty's restrictions, he found a forty percent (40%) loss. These numbers were generated using the Labor Market Access Plus computer program. Using this same program but with Dr. Rawcliffe's restrictions, it showed a seventy-one percent (71%) loss of ability to perform work and access the Wichita labor market. In his opinion, claimant's ability to perform work in the open labor market had been reduced by forty to forty-five percent (40-45%) because of the injuries claimant sustained at work and the resulting permanent restrictions imposed by Dr. Blaty. His opinion is of a sixty-five to seventy percent (65-70%) loss using the restrictions imposed by Dr. Rawcliffe. In addition, claimant's ability to earn comparable wage has been reduced by twenty-five percent (25%) in his opinion.

In arriving at his opinion, Mr. Hardin assumes that claimant had no permanent physical limitations or restrictions prior to the instant injury. He makes this assumption for his analysis because claimant demonstrated the pre-injury ability of working in every strength category up to and including the very heavy strength category as defined by the *Dictionary of Occupational Titles*. This ability was demonstrated by the fact that claimant was actually working in those positions performing that work prior to his most recent accident. The very heavy strength category requires a worker to lift in excess of one-hundred (100) pounds. When Mr. Hardin was asked to assume hypothetically that the claimant had the same restrictions prior to this injury that he had after the injury, he stated that there would be no loss in claimant's ability to perform work in the open labor market. He stated that if claimant had the same restrictions placed on him before the injury then there would be no increase in claimant's labor market access loss following this injury.

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record. K.S.A. 44-501(a).

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 44-508(g).

In the case before us, the weight of the credible evidence supports the claimant's contention that as a result of his work-related injury he is no longer able to continue in his former employment as a heavy laborer in the construction industry. The restrictions imposed by Dr. Rawcliffe and Dr. Blaty as considered by the vocational expert, Jerry Hardin, in arriving at his opinions, are credible and supported by the evidence. The Appeals Board finds the testimony of Mr. Hardin to be credible with regard to the questions of claimant's loss of ability to access the open labor market and to earn a comparable wage despite his not taking into consideration claimant's prior medical condition and restrictions because claimant had clearly demonstrated an ability to perform work in excess of those restrictions. Both loss of labor market access and loss of ability to earn comparable wage are to be considered in arriving at permanent partial general disability. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). No specific formula is required. In this case, the Appeals Board finds no compelling reason to give either factor greater weight and therefore will average both factors giving equal weight to each. Taking into consideration the forty to forty-five percent (40-45%) using Dr. Rawcliffe's restrictions and the sixty-five to seventy percent (65-70%) using Dr. Blaty's restrictions as to loss in claimant's ability to perform work in the open labor market and the twenty-five percent (25%) loss in his ability to earn a comparable wage results in a forty (40%) percent permanent partial general body work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated January 19, 1994, be modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Edward D. Hardin, and against the respondent, Alcon, Inc., and the insurance carrier, CIGNA, for an accidental injury sustained on August 23, 1991, and based on an average weekly wage of $401.35, for 40.28 weeks of temporary total disability compensation at the rate of $267.58 per week in the sum of $10,778.12 and 374.72 weeks of compensation at the rate of $107.03 for 40% permanent partial general bodily impairment of function in the sum of $40,106.28 making a total award of $ 50,884.40.

As of July 22, 1994, there is due and owing claimant $10,778.12 in temporary total compensation and 111.86 weeks of permanent partial compensation at the rate of $107.03 per week in the sum of $11,972.38 making a total due and owing of $22,750.50, less any amounts previously paid. The remaining balance of $28,133.90 is to be paid at the rate of $107.03 per week for 262.86 weeks until fully paid or further order of the Director.

Pursuant to their stipulation, the Kansas Workers Compensation Fund is liable for eighty percent (80%) of the cost of this award.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed 20% against the respondent and 80% against the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Barber & Associates	
Transcript of Preliminary Hearing	$111.20
Transcript of Regular Hearing	70.40
Continuation of Regular Hearing	285.00
Deposition of Thomas Kneidel, M.D.	113.00
Total	**$579.60**
Deposition Services	
Deposition of Eustaquio Abay, M.D.	$134.20
Satterfield Reporting Service	
Deposition of Robert Rawcliffe, M.D.	$178.60
Todd Reporting	
Deposition of Jerry Hardin	$273.05

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I agree with the result reached by the majority even though I also agree with the dissent that this case is distinguishable from Flores v. Cameron Drywall, et al., Docket No. 152,948 (January 1994). Specifically, I agree with the dissent that claimant did have work restrictions prior to the subject accident. In the Flores case, the prior work restrictions were those recommended by a physician used to provide a rating on claimant's behalf in a workers compensation claim. Claimant thereafter worked beyond those restrictions for over five years without apparent difficulty. The Appeals Board found that the evidence did not establish that claimant, in fact, had the limitations suggested by those work restrictions. In this case, I believe the evidence does establish prior work restrictions which do realistically reflect claimant's preexisting limitations.

I agree with the conclusions of the majority, however, for the reasons expressed in the concurring opinion to the Flores decision. As there explained more fully, I do not believe prior restrictions should be used to reduce the work disability rating in cases involving an aggravation of a preexisting condition. In some of those cases, the credit statute, K.S.A. 44-510a, will apply. Where the credit statute does not apply, claimant should be entitled to the full disability, including both the preexisting and the new disability caused by the aggravation. See, eg. Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987); Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

Board Member

DISSENT

I respectfully dissent from the opinion of the majority in this case in awarding a work disability that fails to take into consideration the prior physical condition of the claimant and prior medically recommended restrictions.

This case can be distinguished from the Board's previous decision in Flores v. Cameron Drywall, et al, Docket No. 152,948 (January 28, 1994) where prior restrictions were not found to be material to the issue of work disability because the evidence in that case clearly established that claimant had successfully returned to his regular job and worked in clear violation of his prior restrictions for a period of over five years. In addition, in Flores the restrictions were not given by the treating physician nor was there any evidence that claimant was made aware of the restrictions.

In this case, claimant has a long history of recurrent back problems, repeated injuries, and three (3) back surgeries. He does not appear to have completely recovered from his prior injuries. His back was in a weakened and vulnerable condition and, more importantly, claimant was working in excess of restrictions which were imposed to avoid the types of reoccurrences which in fact happened. While claimant disputes having any restrictions other than to limit his activities to what he could tolerate, the frequent episodes of re-injury and the fact that claimant had three separate surgeries would certainly put him on notice that he needed to avoid very heavy labor to not put himself at risk for further injury. In this case, claimant had missed work due to his back very recently, prior to the subject injury, which further distinguishes this case from our prior decision where claimant had been symptom-free for an extended period of time.

When presented with an analogous factual situation the Kansas Court of Appeals in the case of Miner v. M. Bruenger & Co., Inc., 17 Kan. App. 2d 185, 836 P.2d 19 (1992) approved the trial court's rejection of opinion testimony from this same vocational expert on the question of claimant's ability to perform work in the open labor market and to earn a comparable wage as a result of the injury because Mr. Jerry Hardin did not consider permanent restrictions on claimant from a previous injury. I believe the rationale of the Miner decision should be followed here.

The Appeals Board followed just such a rationale in its decision in Smith v. Excel Corporation, Docket No. 169,519 (June 23, 1994) where we limited claimant's loss of labor market access to only that percentage attributable to the additional restrictions imposed following an injury to his left upper extremity, the second injury, taking into account the labor market lost as a result of the restrictions imposed from the prior injury to his right

upper extremity. There we adopted the premise of a reduced labor market following the first accident when we adopted the opinion of Jim Molski as to claimant's loss of labor market access. "Mr. Molski concluded that this additional limitation to the left upper extremity would diminish the base of jobs that were available after his right shoulder injury by twenty-five percent (25%)." Smith, at p. 11.

For these reasons, I respectfully dissent from the opinion of the majority. Under the facts of this case I would take into consideration the claimant's prior restrictions and pre-existing physical condition in determining work disability.

Board Member

I join in the above dissent.

Board Member

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